IN THE UNITED STATES DISTRICT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

FRIENDS OF GEORGE'S, INC.,

Plaintiff,

vs. NO. 2:23-cv-02163-TLP

THE STATE OF TENNESSEE; BILL LEE, in his official and individual capacity as Governor of Tennessee; JONATHAN SKRMETTI, in his official and individual capacity as the Attorney General of Tennessee,

Defendants.

ORAL ARGUMENT HEARING

BEFORE THE HONORABLE THOMAS L. PARKER

Thursday

30th of March, 2023

CANDACE S. COVEY, RDR, CRR
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UNREDACTED TRANSCRIPT

A P P E A R A N C E S

Appearing on behalf of the Plaintiff:

MR. BRICE TIMMONS
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Appearing on behalf of the Defendants:

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MR. ROBERT WILSON
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Also Present:

MR. STEVEN MULROY
MS. JESSICA INDINGARO

Thursday

March 30, 2023

The Oral Argument hearing in this case began on this date, Thursday, 30th day of March, 2023, at 3:30 p.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: Good afternoon. This is in the matter of Friends of George's, Incorporated against the State of Tennessee and Jonathan Skrmetti. And then I believe we've got a second one, Friends of George's, Incorporated versus Steven J. Mulroy.

Do we have someone here from the district attorney's office?

MR. MULROY: Your Honor.

THE COURT: Oh, Mr. Mulroy.

MR. MULROY: Yes. Good afternoon.

THE COURT: Good afternoon.

MR. MULROY: With me is, for counsel, Jessica Indingaro from my office as well.

THE COURT: Very good. Good afternoon.

MS. INDINGARO: Good afternoon.

THE COURT: All right. The plaintiffs are seeking a TRO. So why don't I hear from you.

MR. TIMMONS: Your Honor, as a preliminary matter, I think we're technically here on a preliminary injunction because everybody has notice, and everybody is here. So there isn't an issue of a lack of notice that would place the limits of a TRO on this hearing. That said, we'll get to the meat of it because the standards are basically the same.

But about the law that we are dealing with here today, the challenge statute. Every year for decades now, our community has been host to an event that celebrates the Tennessee values of inclusion, diversity and taking pride and joy in our community. And at that festival every year for many years now, you would find female impersonators, men in women's attire. The entertainment ranges from the family friendly to sometimes the downright raunchy.

Every year this event includes performances that include what would fall under the statute in question as simulated sexual acts and frankly, simply perverse behavior that is certainly not appropriate for young children and some would argue not even for 17-year-olds.

Some people even believe that these performances are intended to groom and recruit children to the lifestyle that this event promotes. I speak, of course, of -- if we can. That's it. The Memphis international barbecue festival's Miss Piggy Idol.

Every single one of these performers -- and then if you'll look here, some of them are pretty bad -- are engaging in precisely the type of -- that one is particularly awful -- are engaging in a type of conduct that would be swept up in Tennessee Code Annotated 7-51-1407, the statute that the State of Tennessee seeks to implement this Saturday. It would render Miss Piggy Idol as it has historically been conducted criminal. And would probably put a big damper on barbecue fest this year.

Now, we all know that that's not what the legislature intended, and that's kind of the point. What the legislature did intend is to criminalize exactly the conduct seen at Miss Piggy Idol when it is performed by a specific group of speakers, and that is to say drag queens.

The statute is not content neutral. It's viewpoint discriminatory, and as my previous example demonstrates, it's vague and overbroad. All statutes that are content -- that are not content neutral and that are viewpoint discriminatory are presumptively unconstitutional under Reed versus the Town of Gilbert.

Every case I'm going to cite today is a United States Supreme Court case. None of this is limited to the Sixth Circuit, and none of it is particularly nuanced. So far the government has made virtually no defense to the statute itself, and they focus solely on issues of standing,

immunity and redressability.

Standing is, of course, the first question the Court has to answer. But in the First Amendment context, that's easy. For nearly the entire modern history of First Amendment jurisprudence, the Supreme Court has recognized that any individual may make a facial challenge to a speech regulation. And even where the facial challenge fails, an as-applied challenge could still be brought by an organization consisting of and representing performers whose conduct might be criminalized by the statute.

Friends of George's is such an organization. It consists of performers and the production crew of drag shows, that is to say, male and female impersonators. Their performances or performances that they might wish to put on are due to their status as male and female impersonators, either intrinsically criminalized by the statute under one reading or subjected to far broader regulation and enhanced punishments under another reading of the statute. Both of those interpretations are constitutionally impermissible.

If Friends of George's does not have standing to challenge this statute, then courts would necessarily have to wait for an as-applied challenge to take up any facial challenge. And the entire history of First Amendment jurisprudence tells us that is not the case. Our briefs cite three key precedents on this point: Broadrick versus

Oklahoma. Dombrowski versus Pfister. And Secretary of Maryland versus Joseph H. Munson Company.

All of these cases state unequivocally that facial challenge of this nature may be brought by anyone at all. And Munson Company delves into why an organization like Friends of George's would have standing to bring suit under the third party standing doctrine of jus tertii standing. Even if the standard proposed by the government today is, in fact, the correct standard.

So Friends of George's is the proper plaintiff. And that brings us to the question of who is the proper defendant. We've addressed those issues in our briefs, but in short, we are going to concede today that the state itself is not subject to Eleventh Amendment abrogation under this legal theory and consent to its dismissal. The Sixth Circuit decided a case in 2022 that if it didn't hold that exactly, it was very, very close to doing so.

THE COURT: So can we say good-bye to half the lawyers in this room?

MR. TIMMONS: Unfortunately, I don't know if you can say good-bye to any of the lawyers in this room because that's just the State of Tennessee itself.

THE COURT: I see. Okay.

MR. TIMMONS: The governor -- and to be clear state officials are stripped of their immunity under Ex parte

Young. And the single best discussion of Ex parte Young that I've seen in the Sixth Circuit recently is the one that ends up in a case cited and relied on most heavily by the defendants, the Universal Life Church case cited in their briefs. We've also included reference to it in ours.

The case deals specifically with the immunity of -- and justiciability issues related to the governor, the attorney general and district attorneys in the State of Tennessee in their official and individual capacities. It's essentially dispositive, except for one small detail.

That case was not a facial challenge to an overbroad statute that sought to regulate speech. And as a result of that, I think the prudential concerns that relate to the justiciability issues as to the governor and the attorney general would be similar to the prudential concerns that I just discussed for the purposes of standing.

And so here, the governor has made public statements, and we've cited to them directly in our briefs and filed the news articles in which they're quoted. That would lead a reasonable person to believe that he will use his power to command state-level law enforcement agencies in Tennessee to enforce Section 1407, the challenge statute.

THE COURT: What power does he have to do that? I didn't see a citation to any examples or any statute or constitutional...

MR. TIMMONS: Well --

THE COURT: Help me with that. Go ahead.

MR. TIMMONS: Sorry. So he is the -- it falls under his take care power. But he does command the state police forces, the Tennessee Bureau of Investigation, the Tennessee Highway Patrol. He appoints them and he directs them and can issue executive orders relative to them. The fact that he has said that this specific statute is one that he wants to see enforced would lead one to believe reasonably that he might enforce it. And a credible threat of enforcement is the legal standard. Again, that's in the Universal Life Church case. It's discussed at great length. And that case there was no reason to believe that the governor would have anything to do with that. Here, he's made public statements about this specific act.

The attorney general and district attorney general now share dual and divided responsibility for enforcement of the state's criminal statutes. If the district attorney general doesn't enforce the statute categorically, the duty falls to the attorney general to seek the appointment of a prosecutor pro temp. And he continues to bear responsibility for that statute's enforcement at the trial level in those cases. And he always has enforcement power at the appellate level.

So either the attorney general, the district

attorney general or both are a proper defendant in this case, depending on the positions taken by the district attorney. So it's a mixed question of fact and law which of them is the proper defendant. The same prudential concerns as I mentioned would apply here to the justiciability questions related to the defendants as would apply to the standing analysis.

But in any event then, the collateral litigation filed, which was admittedly filed in response to the state's briefing last night. District Attorney General Mulroy is the official charged with enforcement of the statute at the trial court level. And the analysis in Universal Life Church of the likelihood of enforcement, the threat of enforcement applies here too.

He has not -- District Attorney General Mulroy has not disavowed the statute's constitutionality formally. Just as in that case, he has the constitutional and statutory obligation to enforce the statutes of the State of Tennessee.

Unlike in other jurisdictions where district attorneys general have given categorical assurances that they won't enforce certain laws that they deem unconstitutional. District Attorney Mulroy has consistently taken the position that he won't give any categorical assurances about not enforcing any statute duly enacted by the legislature. He's said that every time he's been asked about any statute. And

he said that here as well. And I think it's simply the fact that he understands his constitutional obligation to be to enforce the laws of the State of Tennessee, not to make the laws of the State of Tennessee.

And the district attorney's office of Shelby County does have a long track record of prosecuting both criminal and nuisance cases under the adult-oriented business statutes that Section 1407 purports to incorporate by reference. You'll find all of those factors are the elements that the Sixth Circuit relied on in the Universal Life Church case that is at issue here.

Okay. Now, turning to the substance of the statute itself, the legislature has sought to regulate a subcategory of speech, based on the speaker's identity and the content of the speech itself. This is no different from a public university choosing to only regulate political speech made by conservative professors or to prohibit only theatrical productions put on by blue-haired women's studies majors. You can't regulate a subcategory of speech based on who the speaker is and what their viewpoints might be.

The fact that the government claims that the speech in question is harmful or even specifically harmful to children does not save it from strict scrutiny under the Supreme Court's holding in Reno versus the ACLU. Speech we

don't like is still subject to First Amendment protection because we cannot defend the right of honest, reasonable discourse among citizens to debate political, social, artistic and scientific issues of importance by waiting until on idea or speaker that the majority agrees is important is attacked.

H. L. Mencken said, "The trouble with fighting for human freedom is that one spends most of one's time defending scoundrels. For it is against scoundrels that oppressive laws are first aimed, and oppression must be stopped at the beginning if it is to be stopped at all." Friends of George's are not scoundrels. Not even remotely.

But in order to ensure their right to expression is protected, they are forced to defend the rights of people that the legislature would seek to paint as scoundrels. People that it claims that are engaging in performances harmful to children. The state has for many decades now successfully protected children from the types of sexual content that this statute purports to regulate through a narrowly tailored scheme of obscenity statutes, adult-oriented business regulations and indecent exposure laws. This statutory scheme has been so successful that when asked by a reporter for an example of what HB9 was protecting children from, Governor Lee could not name one single incident.

That alone should let the Court know that enjoining this statute from taking effect pending a trial on the merits will work no harm to anyone. But it will mitigate the disastrous chilling affect that has made performers ranging from drag troops to Nashville professional musicians uncertain of whether their performances are crimes, if they are done in any place that a person who is 17 years old and 364 days might view them, even if that person has parental accompaniment, parental consent. Even if it's viewed accidentally and even without the performer engaging in any commercial activity at all. All of those factors I just mentioned and more are the types of narrow tailoring present in the adult-oriented business statute that 7-51-1407 purports to reference for its definition of harmful to minors.

Plaintiffs take issue with aspects of that definition, which has never been challenged in federal court. But by removing it from the context of constitutionally sound time, place and manner restrictions, the narrow tailoring to ensure that the rights of parents are protected, its limitation to commercial activity. In this case the legislature has gone too far and swept up constitutionally protected expressive activity.

The statute lacks this type of careful tailoring because it is, after all, a political stunt. And it's the

most dangerous kind of stunt. It's a stunt that will harm the unwary bystander. It was not carefully planned.

The legislature made no legislative findings to determine how children were not adequately protected by the existing statutory scheme. And thus they cannot demonstrate -- and it is their burden to demonstrate this. They cannot demonstrate that this protects a compelling governmental interest. That's the first step they have to take.

But then they have to show under Reno versus the ACLU and Ashcroft versus the ACLU, both statutes which dealt with Congress's faltering efforts to regulate Internet pornography that they've got to show that these -- that the statute they are enacting is superior to the statutes that already exist. They've got to demonstrate the compelling government interest. And then they've got to show how the statutes they're enacting are more narrowly tailored than the ones that already exist or conversely, why those narrowly tailored statutes that are already on the books don't do the job sufficiently.

And we know they can't do that because they didn't even bother to do the legislative legwork to demonstrate that this was necessary at all. The bill's sponsor made clear what they really wanted to regulate. Representative Chris Todd stated over and over on the House

floor and in the media to anyone who would listen that he was trying to criminalize conduct like that which had been proposed in his district, which is Jackson, last year. And that was a drag show featuring performers in full-length dresses and gowns doing vetted musical and comedy content that would be appropriate for all ages. He specifically stated that drag content was never appropriate for children. That it could not be appropriate for children.

The bill's Senate sponsor also referenced a drag show at Tennessee Tech as the type of conduct that would be prohibited. And that likewise fell completely and unambiguously within the realm of constitutionally protected speech. Now, apparently somebody suggested that it might be a problem that they were sweeping all of this First Amendment protected content up into their definition of harmful to minors content.

So when asked on the House floor at the very end of the debates whether the regulation would prohibit family-friendly drag shows. Asked specifically about family-friendly drag shows, he then declined to answer, stating that it was not up to him, the bill's primary author and sponsor, to say what kind of conduct the bill prohibited. If he doesn't know, no one can. And that was precisely the point. The bill is designed to chill the speech of drag performers anywhere and everywhere that is not in the back of

a dark, smoky bar with blacked-out windows, which is the only place that the bill sponsors imagine drag performers belong at all.

If this bill does not criminalize all performances by male and female impersonators, which is one perfectly plausible reading of this statute, its purpose is to be so ambiguous that it would create a kind of self-censorship that the First Amendment prevents them from achieving through direct legislation.

Fortunately, the First Amendment prohibits that too because the Supreme Court has been clear that a government may not regulate speech in a manner that is not content neutral. It may not regulate speech in a non content-neutral manner, even if that speech would otherwise be unprotected by the First Amendment. Specifically including obscenity and true threats. And we'll get to that in detail in a second.

I do want to emphasize that this speech is protected by the First Amendment because it is not defined narrowly within the confines of true obscenity. And it doesn't make any reference to true threats, and it further -- it excises it from the realm of commercial speech, which is another category of potentially less protected speech.

So by putting this regulation in place that could follow people into their homes or in private events, anywhere

that a minor might see, they've stripped it of that category of -- well, they have restored the First Amendment to that category of protection rather than stripping it because it's not commercial speech anymore.

It no longer merely applies to obscenity because obscenity is a test that applies to the world at large. There is no obscenity test just for minors. There is a compelling government interest in protecting minors from obscenity. But when you start regulating speech that is inappropriate only for minors, and that's what the definition of harmful to minors does, you've now moved into the realm of speech that is not, per se, obscenity. And it's got to be narrowly tailored.

And it's not as though the legislature doesn't know how to do that. They've done it with the adult-oriented business statutes. They've done it with obscenity statutes. They've done it with indecent exposure statutes.

So emphasizing that this speech is protected by the First Amendment, I want to go back to addressing those outer limits where speech isn't even protected by the First Amendment. In R.A.V. versus City of St. Paul, the court addressed itself to a case involving a burning of a cross on the lawn of an African-American family. And in its very detailed analysis, in a majority opinion written by Justice Scalia, the court delved into the regulation of speech of

non First Amendment protected speech on a content and viewpoint discriminatory basis.

R.A.V. stands for the proposition that states may only regulate subcategories of otherwise prescribable speech when it does so without reference to the content of the speech itself or the viewpoint expressed in the speech. Justice White wrote a concurrence in R.A.V., and he accused the majority in that case of creating a doctrine of underinclusiveness. Essentially he said that, of course, we all get what overbreadth is and why we don't want to regulate speech in an overbroad fashion because you might sweep up protected speech. But what's the problem, he says, with regulating only subcategories of unprotected speech? Hate speech is so noxious, he said that we ought to be able to regulate it when it rises to the level of true threat.

Justice Scalia had some particularly sound retorts to that point. He said writing for the majority he rejected that characterization. Said the majority and the majority reason that governments may regulate those subsets of speech, insofar as they're regulating something like the medium in which that speech is conveyed, say speech over a telephone versus speech through the mail.

And they can regulate subsets of speech when they apply to, say, different categories of businesses. But there are some limits, and they are all related to the viewpoint

and the content of the speech. A myriad of examples. I'm just going to read these as direct quotes because I don't think I can do any better.

These are direct quotes from the majority opinion. Quote, A state might choose to prohibit only that obscenity which is the most patently offensive in its prurience, i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages.

This is the next quote. The federal government can criminalize only those threats of violence that are directed against the president, since the reasons why threats of violence are outside the First Amendment, protecting individuals from the fear of violence, from the disruption that fear engenders and from the possibility that the threat and violence will occur have a special force when they are applied to the person of the president.

But the federal government may not criminalize only those threats the president -- against the president that mention his policy on aid to inner cities. And to take a final example, this is a direct quote, one mentioned by Justice Stevens. A state may choose to regulate price advertising in one industry but not in others because of the risk of fraud. One of the characteristics of commercial

speech that justifies depriving it of full First Amendment protection is in its view greater there. But a state may not prohibit only that commercial advertising that depicts men in a demeaning fashion. Likewise, the state may not discriminate between types of speech that depict men in dresses. The statute is unconstitutional, and this Court should enjoin it from taking effect pending further hearings on this matter.

THE COURT: All right. Thank you, Mr. Timmons. I left something in my office. So give me one minute. I'll be right back.

(Break.)

THE COURT: It seems to me that Mr. Newsom, I suppose, from your team, we should hear from you. But might make more sense to hear from Mr. Mulroy's office to see if they're ready to take a position on this statute.

MR. NEWSOM: Yes, Your Honor.

THE COURT: All right.

MR. MULROY: Thank you, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. MULROY: Steven Mulroy, district attorney for the 30th Judicial District, Shelby County. I want to make clear today that I am representing myself in my individual capacity, and I was informed by the attorney general earlier

that they are representing me in my official capacity. For purposes of this hearing, I will take them at their word.

I only want to speak to one matter today, Your Honor. The only matter that I think has to be decided today is whether a TRO should be entered. I just want to make clear on behalf of -- I will not oppose the entry of a TRO. I am aware of the fact that there is -- and I was just served, by the way, in this matter. So there are limits to what I am prepared to talk about.

But I am prepared to say that I don't oppose the TRO. I am aware of the fact that there is great uncertainty and great concern among the people in Shelby County regarding the scope, the applicability, the validity of the statute.

And I believe that it would be useful, for my purposes anyway, to get that uncertainty resolved. Regarding the exact scope and applicability and validity of the statute, it would be useful to have it resolved before I make any decisions regarding enforcement. I understand that this Court may end up deciding that the statute is completely valid, completely invalid, partially invalid and may apply a narrowing construction or a clarifying construction, any of which would be useful for me to know before I begin to enforce the statute.

I will just say this, that it strikes me that without taking any definitive position regarding the

constitutionality of the statute, certainly there are some nontrivial issues here. And certainly with respect to the balance of harms factor and the public interest factor, I would say that they weigh in favor of granting the TRO. And that's really all I'm prepared to say this afternoon, Your Honor, having just been served today.

THE COURT: All right. Thank you, Mr. Mulroy.

MR. MULROY: Thank you, Your Honor.

THE COURT: So Mr. Newsom, based on that, I take it you are representing him in his official capacity.

MR. NEWSOM: That's my understanding, Your Honor. Yes.

THE COURT: Well, it's either you or him. I'll take you that you're going to -- yes, sir.

MR. MULROY: If I could simply to that point, you know, I was just served today. I was informed by Mr. Newsom that under the applicable statute, they basically would represent me in my official capacity, even if I didn't want that to happen. I've looked at the statutory language. I don't think it's crystal clear. I haven't had a chance to research it, but certainly for purposes of this hearing today and this hearing today only, I'm happy to say that Mr. Newsom knows more than I about that. And so since I was able to speak in my individual capacity, I think I've made my position clear.

THE COURT: Yes, sir.

MR. MULROY: Thank you.

THE COURT: All right. Yes, sir. Mr. Newsom?

MR. NEWSOM: I appreciate General Mulroy's statements. He's most gracious. That is our interpretation of the statute that when a Tennessee official is sued in his official capacity, there's a nondelegable duty on the part of the attorney general's office to represent that state official, that being District Attorney General Mulroy in this instance.

Your Honor, I take it from my friend Mr. Timmons' remarks that he has no proof to put on today?

MR. TIMMONS: We filed a number of declarations earlier today, inclusive of -- and the Court has copies apparently.

MR. NEWSOM: I should be more clear about that. Any live proof today?

MR. TIMMONS: I am able to put on some live proof relative to those declarations, if the Court would like. Given the late hour and the short fuse on this, I sort of assumed that the Court would want to see initial proof today and would likely set a later hearing that would be more in-depth and substantive after everybody had a chance to brief the matter more fully. I am prepared to go forward either way.

MR. NEWSOM: I'll address my remarks to the Court, of course. We're here today on a prescheduled hearing on the Friends of George's versus State of Tennessee Docket Number 2163, Your Honor. I may say for the record that I have with me Robert Wilson and Steven Griffin with the Office of the Tennessee Attorney General.

THE COURT: Yes, sir.

MR. NEWSOM: And it's our delight to represent the State in this case today.

Preliminarily, I will say that my friend Mr. Timmons has a broad view of the statute, which the State does not share. As a matter of fact, the case of Miller versus California from which is -- from which much of the statutory language is drawn in this instance makes it clear that obscene material is not protected by the First Amendment. And while my mother may wish to wash my mouth out, I may go into a bit of what the statutory language says that would advise the Court that the acts that are prohibited to be done as harmful to minors in their presence are obscene acts, which are well within the government's power to regulate, Your Honor.

Let me first take up some of the issues that relate to standing in regard to the first case.

THE COURT: Now real quick.

MR. NEWSOM: Yes, Your Honor.

THE COURT: I'm sorry. When you say that Miller versus California, that this statute follows Miller versus California, is that when it references Tennessee's Obscenity Statute 39-17-901?

MR. NEWSOM: In part, yes, Your Honor. Because as we look at the statute that has been enacted by the legislature but is not yet in effect, there are various borrowing provisions in the statute that refer to other provisions of Tennessee statutes that precede the enactment of this statute. So when you take all those together as a piece, you see the conduct that the statute intends to regulate.

THE COURT: Yes, sir.

MR. NEWSOM: And taking all that together, there has been no statement by Mr. Timmons nor is there any proof in the record that indicates that the performers of the Friends of George's intend to undertake acts that would violate the statute. And so Your Honor, while one might talk about Miss Piggy all day long, we don't view Miss Piggy as being in violation of the statute, even if it goes into effect if she were to appear at the barbecue festival. And so there are the harms that are being proposed by the plaintiff here, we think are not existent as far as the statute is concerned.

The statute makes it an offense for a person to

perform adult cabaret entertainment, either on public property or in a location where the adult cabaret entertainment could be viewed by a person who is not an adult. Adult cabaret entertainment, for purposes of the statute, is defined as a single or multiple adult-oriented performances that are harmful to minors as that term is defined in 39-17-901 and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators or similar entertainers. A performance is harmful to minors where the quality of any description or representation in whatever form of nudity, sexual excitement, sexual conduct, excess violence or sado-masochistic abuse would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors. Is patently offensive to prevailing statutes -- standards in the adult --

THE COURT: Mr. Newsom, what are you reading from right now?

MR. NEWSOM: This is from the statute itself from 2003 public chapter Number 2, if Your Honor has that before you. And as a matter of fact, I might, if I could use -- do you still call it the Elmo?

THE COURT: We do. And we use it every day.

MR. NEWSOM: Go there and we can walk through this, Your Honor, because I think it would be helpful to the

Court. I may need some coaching on this.

THE COURT: It's pretty self-explanatory.

MR. NEWSOM: We're going to zoom it up a little bit. That's the wrong way. All right.

So the statutory language is -- and should I have my -- you can hear me, I'm sure.

THE COURT: Yes, sir. There's a microphone. That gray bar up here on the podium right there is a microphone.

MR. NEWSOM: Great.

THE COURT: You're good.

MR. NEWSOM: So this statute will become part of 7-51-1401, of course, if the Court allows it to go into effect. And as I was saying, adult cabaret entertainment means adult-oriented performances that are harmful to minors as that term is defined in 39-17-901. And if we turn to --

THE COURT: Right. And that's the statute that goes back to the Miller versus California standard.

MR. NEWSOM: Correct. Yes, Your Honor.

THE COURT: Okay.

MR. NEWSOM: And so if we go there, we talk about nudity by showing the human male or female genitals, pubic area or buttocks with less than a fully opaque covering. And let me -- just so I can display that. Do you want me to display that, or would that be helpful to the Court?

THE COURT: No. I thought that's what you were reading from.

MR. NEWSOM: Correct.

THE COURT: Because I was reading along with 7-51-1401, and the obscenity statute covers quite a bit.

MR. NEWSOM: Yes, it does.

THE COURT: You were about to read all the different ways --

MR. NEWSOM: And I don't think you need that, Your Honor.

THE COURT: I would rather you didn't. But the reason I'm asking you this question is because I was struck by how scientific the verbiage was. And it covers what it covers, right?

MR. NEWSOM: Correct.

THE COURT: As they say at the Supreme Court, you'll know it when you see it.

MR. NEWSOM: That's right. And what one of the sponsors of the legislation may have said or wanted but didn't end up in the language of the statute is really of no moment to the Court.

THE COURT: But my question is really, so why do we need this statute? If what you were about to read covers what it covers, why do you need to then go in and talk about what this statute covers?

MR. NEWSOM: Because, Your Honor, the legislative intent is that this applies to a circumstance in which minors are exposed to that conduct.

THE COURT: Well, you just said we didn't need to worry about the legislative intent.

MR. NEWSOM: Well, it's -- I'm sorry.

THE COURT: But I guess my question called for it, but go ahead.

MR. NEWSOM: The legislative intent as reflected in the statute is certainly something that this Court should consider.

THE COURT: Okay. All right. But some would argue that obscenity as defined already --

MR. NEWSOM: Yes.

THE COURT: -- protects minors, doesn't it?

MR. NEWSOM: Certainly you could make that argument. I think that it does. And I wouldn't shirk from that, but I think that --

THE COURT: So what else does this statute cover that obscenity doesn't cover?

MR. NEWSOM: Your Honor, it's right on -- nothing really. But it's not broad as my friend Mr. Timmons would like to describe it so as to -- as he does not tell us by way of any proof that he has put in the record that there is a perform er who is associated with Friends of George's who

intends to include these aspects as a portion of their performance or their entertainment.

So Your Honor, going back to the question of standing, and if I may retreat back to my other position.

THE COURT: Sure.

MR. NEWSOM: That would be easier on me. That we really do have a circumstance in which a TRO would be inappropriate because the plaintiffs have failed to show a likelihood of success on the merits in that a plaintiff who cannot demonstrate that standing is present is not in a position to come in and ask this federal court to provide relief.

THE COURT: And you're saying they don't -- they lack standing because there's no one that's part of the Friends of George's that plans to put on any obscene material?

MR. NEWSOM: There's no injury in fact, as the language of the cases say, that's concrete and particularized. That's actual or imminent and not conjectural or hypothetical and that's in Spokeo as referenced in our brief and other cases as well. The threatened injury to be an injury in fact must be certainly impending to constitute injury in fact. And allegations of possible future injury are not sufficient.

THE COURT: Well, and that may hold true,

Mr. Newsom, but this is a criminal statute. I mean, you know, so we're just supposed to eat the mushrooms and wait to find out if they're poisonous or not?

MR. NEWSOM: No, Your Honor.

THE COURT: Is that the approach?

MR. NEWSOM: Well, there's -- I cannot come in and ask this Court for an advisory opinion with regard to any claim that I have that's purely conjectural and doesn't pose to me a likelihood of injury in fact. The complaint is almost devoid of factual allegations by which there's any assertion that the production set to begin on April the 14th or in fact any other performance will involve adult cabaret entertainment that involves these aspects that we've been discussing, nudity, sexual excitement, sexual conduct, excess violence or masochistic or sado-masochistic abuse, as those terms are defined in the statute. Nor, Your Honor, even if the plaintiff had asserted a proper injury, those injuries are not fairly traceable, of course, to the governor or the attorney general, who Mr. Timmons wishes to keep on as defendants in this matter.

Of course, DA Mulroy has the ability to enforce the statute, and as Mr. Timmons had indicated, has the duty to enforce the statute should there be a violation of the statute, apart from his personal misgivings about the constitutionality of the statute, we would assert. And

finally, there is no redressability. The plaintiff must plead facts sufficient to establish that the Court is capable of providing relief that would redress the alleged injury.

Here the plaintiff has not shown that it has an injury fairly traceable to the governor or to the attorney general. And no remedy applicable to those defendants, be it an injunction or a declaration, would redress their alleged injuries. Now, Your Honor, with regard to General Mulroy -- and, of course, when this matter was set, we all -- all we had on our plate was the original lawsuit.

The second lawsuit was filed this morning. And -- but we assert, Your Honor, that there is no basis on which even naming DA Mulroy gives this Court a basis on which to find that there is standing for the reasons that I've mentioned previously. And that even the addition of General Mulroy to this case does not get them over the line because this statute regulates, as we've discussed, obscene conduct that is not protected by the First Amendment.

Your Honor, the plaintiff also asserts that First Amendment challenges are subject to a different set of prudential concerns, and thus a different test for standing applies because they contend that the statute is overbroad in their regulation. They rely mostly on Secretary of State of Maryland versus Joseph H. Munson Company for the proposition that any party sufficiently concerned with the chilling

effect that a speech regulation might have may challenge the speech.

But to the extent that plaintiff claims that it does not have to show Article III standing, that is incorrect. The Sixth Circuit in Prime Media, Incorporated versus City of Brentwood, 485 F.3d 343, it's a 2007 Sixth Circuit case concluded that no plaintiff can litigate a case in federal court without establishing constitutional standing under Article III. And that is an injury that is fairly traceable to the defendant's alledgedly unlawful conduct, and that is likely to be redressed by the requested relief.

Overbreadth challenges allow a plaintiff to attack the constitutionality of a law, not because of their own rights of free expression but because the law's very existence may cause others to restrain -- refrain from constitutionally protected speech or expression. Overbreadth challenges are an exception to the prudential standing requirement that a party may only assert a violation of its own rights. And because overbreadth creates an exception only to the prudential standing inquiry, the Supreme Court has made clear that the injury in fact requirement still applies to overbreadth claims under the First Amendment.

So Your Honor, since plaintiff has not established an injury in fact or for that matter traceability or redressability against the state, the governor -- well,

they've admitted with regard to the state, the governor, the attorney general, the plaintiff under these circumstances also lacks standing, Your Honor.

THE COURT: All right. Thank you, Mr. Newsom.

Give me one second. We have a jury that's been deliberating so let me find out. They knocked on the door.

MR. NEWSOM: Yes, Your Honor.

(Short break.)

THE COURT: All right. So Mr. Timmons.

MR. TIMMONS: Yes, Your Honor.

THE COURT: Why don't I hear your response? Unless -- I didn't know if there's anybody else that needed.

MR. NEWSOM: Your Honor, I'm sorry. I was not quite through.

THE COURT: Oh, okay.

MR. NEWSOM: That's fine.

THE COURT: Well, when you sat down, I thought -- all right.

MR. NEWSOM: Sorry.

THE COURT: Fire away, Mr. Newsom. Sorry. I didn't mean to cut you off.

MR. NEWSOM: Well, thank you.

I will say, Your Honor, I think that we've heard from Mr. Timmons that perhaps this is also a preliminary injunction hearing and perhaps it's not. I would take the

position that this is not a preliminary injunction hearing and the matter that is before the Court relates to the TRO and agree with District Attorney General Mulroy on that point, Your Honor.

THE COURT: Okay. Anything else?

MR. NEWSOM: No, that's it.

THE COURT: All right. Mr. Timmons, I'll hear your response, and then what I would like to do is maybe take a short break, collect my thoughts. Y'all have given me a lot to think about, and I'm sure I have some questions that I want to ask you. But I need to think about it first. All right.

Yes, sir, Mr. Timmons?

MR. TIMMONS: We'll take -- one of the lovely things about litigating these things with such little notice is that we all learn about new cases that the others are going to rely on as we go. And so to that end, I've only just had the opportunity to read as much of the Sixth Circuit case Prime Media versus City of Brentwood, on which Mr. Newsom just relied as I can. And I think the Court really just hit the nail on the head right out of the gate when you said this is a criminal statute. That's a media licensing statute. The issue there was whether -- something to do with height limits. And something to do with -- this is not a criminal statute at all.

This has to do with whether somebody can obtain a license. And if they haven't tried to apply for the license or they're not affected by a licensing statue, then the case law on civil First Amendment issues is with Mr. Newsom. But the Broadrick court didn't mince words. And it doesn't just talk about prudential standing. It does talk about prudential considerations in the case.

But it says and I quote, As a corollary the court has altered its traditional rules of standing to permit in the First Amendment arena attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with a requisite narrow specificity.

Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

And to be clear, Friends of George's represents a group of male and female impersonators. Their conduct is potentially regulated by the statute because they're going to have to conform their conduct to the statute. Now, what does that mean? Mr. Newsom says they haven't indicated that they're going to put on -- they haven't put on evidence that

they intend to violate the statute.

Well, I don't know what the statute means. I spent two hours on the phone with a Baker Donelson attorney this afternoon representing a theater organization who described themselves as having to draft a "choose your own adventure" flowchart to figure out what it means. When I looked at the performances from Miss Piggy, I was convinced that just about every photo I saw either came close to or did, in fact, violate the statute. But Mr. Newsom doesn't think so.

The statute is not narrowly tailored. It is vague. It is overbroad. And it is presumptively unconstitutional. That's another point I want to come back to. It is the burden of the state to demonstrate that the challenge statute is constitutional, not the other way around.

THE COURT: And you're saying that because it's a content.

MR. TIMMONS: Because it's content-based statute. Now, there is a field -- there is a strain of legal thought that obscenity is not unprotected speech, but that it is not speech and is therefore unprotected. I wouldn't call that anything close to a settled question of law.

But I want to go address the Miller analysis. The Miller analysis, Miller versus California is not specific

to minors. It is about regulating conduct and what is fit for adults. The only case that -- and it still is, to some degree, good law.

But the Ginsberg case that predates Miller by five years is the case that says we can regulate minors differently than we can adults. But Miller comes after that. And it says what obscenity is is -- and it provides the familiar three-prong test.

Every case after that to rely on Miller and Ginsberg to address speech relative to minors and the two key cases are Reno versus ACLU and Ashcroft versus ACLU. Every one of those cases and all their progeny rely on strict scrutiny standard. They say this is content-based speech. We're going to analyze it under the strict scrutiny non content-neutral framework.

So the government can't save the statute just by saying well, let's incorporate most of Miller and make a little tweak we like. And then well, that's close enough to obscenity to save it.

Actually the Supreme Court had a great quote on this if I can find it here. Yeah. Reno versus the ACLU, the government really put this pretty succinctly. The government may not reduce the adult population to only what is fit for children. Regardless of the strength of the government's interest in protecting children, the level of discourse

reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox. I think we all know -- I know it's a euphemism, but I think we all know that children check the mail.

And so if the government's response to that is well, we're saying you have to take this conduct and put it somewhere where a minor can't possibly see it. That's not a reasonable restriction. That's not narrowly tailored, and it's ambiguous. What does that mean? Does that mean my house? What if somebody -- what if I'm --

THE COURT: Is that your primary issue with it? The fact that it says that the performance can't be either in public or in a location where the adult cabaret entertainment could be viewed by a person who is not an adult?

MR. TIMMONS: That's one of the major issues with it. I don't know that I have a primary argument about this statute because there are so many to choose from. But the fact that it is extremely vague as to where this could take place is hugely problematic. But it's by design. It's by design. The statute is intended to again, force people back to places where there's no possibility that children could see this.

But we do take issue with the content restrictions themselves as well and those definitions. If you limit those definitions to adult-oriented businesses that

are much more specifically defined, then perhaps they survive. But that's part of the narrow tailoring. That's part of the narrow tailoring analysis.

And every single one of those issues that I mentioned, whether it's commercial speech, the precise nature in which it is regulated, you know, the strictness of the time, place and manner restrictions and the parental consent issue. The issue of whether parental consent is an affirmative defense, which it is in our existing adult-oriented business statutes. And those issues are all explicitly discussed in the analysis in Reno and come up again in Ashcroft.

Let's talk about the injury in fact issue very quickly. I do understand that the state takes issue with our view that Broadrick is sufficient to get us through the door to the courthouse. In Elrod versus Burns, which I haven't cited anywhere, so it is 427 U.S. 347, 1976. Right after Miller. A year after Miller, I think. The Supreme Court held that the deprivation of a First Amendment right constituted an injury in fact and that it was sufficient injury to establish irreparable injury for the purposes of injunctive relief. When the government passes a criminal statute that quashes everybody's speech, we don't all have to go out and say I intend to engage in this speech and then before I can go to court and do it. I'm sorry. Go to court

and argue that I should be able to do it.

Let's see. We've talked about presumptive and constitutionality.

THE COURT: Mr. Timmons?

MR. TIMMONS: Yes.

THE COURT: I would ask you to pause for a moment.

(Short break.)

THE COURT: All right. Mr. Timmons, sorry about that.

MR. TIMMONS: No problem at all, Your Honor. I appreciate a moment to gather my thoughts. I mentioned a moment ago that the government -- because this is a presumptively unconstitutional statute, the government has to show a compelling government interest. It can't just list protecting children, you know, as a set of magic words to get around that issue. It's got to demonstrate how those children are going to be harmed. And the state just conceded to you that this statute doesn't cover anything that wasn't already illegal. The statute does nothing according to the government.

THE COURT: So what are you afraid of?

MR. TIMMONS: Well, I'm afraid the statute does do quite a bit. I'm afraid that it, first of all, heightens the penalty available from a misdemeanor to a felony for

someone in one of those protected categories. I'm sorry, not one of those. Described categories of speakers. A male or female impersonator who violates that statute is subject to a misdemeanor on the first arrest but felonies for everyone after that.

So now we're talking about depriving people of their right to vote. Branding them infamous because they belong to a particular category of speaker. And they're going to violate -- when they violate a statute that they admit is redundant and only applies to these specific categories of speakers. Actually a moment ago you asked me what was my biggest -- I think my biggest problem with this statute. That's it.

THE COURT: Yeah. Okay.

MR. TIMMONS: That's it. We're talking about turning people into felons because they belong to a specific category of speaker and they violate a statute that is essentially already on the books and applies at a lower standard to everybody else. That's the one that personally offends me. And I think it's also one of the most compelling arguments.

But the state just told you that this statute doesn't cover anything that wasn't already illegal. If that's actually true and if that's what the state intended, you know, when I taught civil rights and constitutional law,

that's the example I used for helping students understand what a lack of legitimate governmental interest was. Let alone a compelling governmental interest. Passing a law that they claim does nothing is -- deprives them of a compelling governmental interest almost certainly. They have the obligation to show why this statute is necessary under Reno, and they can't even -- they don't have any evidence to support it, and they can't even answer the question.

Now, Mr. Newsom also indicated that it was not relevant what the bill sponsor said. There are differing schools of thought on statutory interpretation. That's fair. I personally lean a little textualist. I don't think legislative bodies do a great job of agreeing on what everything means.

However, when we're talking about this type of law that's directed at a specific group of people and that is directed at a category of speech, Supreme Court precedence -- and I'm quoting from Reed versus Town of Gilbert. Supreme Court "precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech; laws that cannot be justified without reference to the content of the regulated speech or that were adopted by the government because of disagreement with the message that the speech conveys. Those laws, like those that are content

based on their face, must also satisfy strict scrutiny."

Briefly on the issue of who the right defendant is, I just want to say that our absolute best position when it comes to standing or when it comes to who the right defendant is rather, is the district attorney. And it is because of the Sixth Circuit case on which the state relies heavily. The Universal Life Church case goes into a deep analysis of why district attorneys are proper parties to laws like this that have not yet been enforced.

But it also goes a little bit deeper into the analysis under Ex parte Young. And I can't recall if I said this earlier or not, but Ex parte Young -- and I think everybody who spends a lot of time doing this field of work gets a little frustrated with the idea that it is a complicated legal fiction. It is a complicated legal fiction.

The dissent in Ex parte Young points out that really this is all about suing the government over what laws are constitutional. And this distinction between individual capacity or official capacity is very cerebral and academic but not practical. But that's the dissent, and that's not the law.

Ex parte Young describes the mantle of the state being on a government actor, and it describes when you move into the realm of constitutionally violative statutes because

a state can't authorize those. It says that that person is then stripped of that mantle and then acts only in their capacity as an ordinary person, their individual capacity.

And so the individual capacity claim against the district attorney general is the claim that is most valid here. And I think when you review the Universal Life Church case, you'll see that that's not merely still a good law, but it's the analysis with regard to this specific group of district attorneys, Tennessee district attorneys general that the Sixth Circuit has already applied.

I do want to say one last thing about the vagueness of this law because I somehow didn't work this in previously. The definition section that Mr. Newsom showed you earlier that defines content harmful to minors, it also defines community for the purposes of the community standards test.

I was kind of blown away because Miller is pretty clear that the community can be the state. Miller versus California, the jury instruction in Miller made the -- was to tell the jury apply the community standards of the State of California. That was challenged by the -- by Miller on the grounds that a national standard was appropriate. And the Court ultimately said now, you apply a community standard to two parts of the analysis, but federal judges retain the power to apply national standard to what has legitimate

artistic, political, social or scientific value. The State of Tennessee however, chose to balkanize this statute even further and defined community as the judicial district in which the allegations -- or the criminal act is alleged to have occurred.

Citizens of Shelby County and the members of Friends of George's and Friends of George's itself in general have no notice of where in the state they can travel and perform their art and what they're allowed to do in each judicial district, unless they go do some sort of a public opinion survey about the community standards in that particular judicial district. This is a statewide statute with 32 different definitions, according to the face of the statute. And I cannot find any case on point on that issue, but that seems to me to be intrinsically vague. It certainly does not put these individuals, these actors on notice of what's illegal wherever they go.

And unless the Court has any questions, I believe I've used too much of your time today.

THE COURT: Actually, you haven't.

Yes, sir, Mr. Mulroy?

MR. MULROY: Your Honor, just very quickly, I have to speak at a community forum in a little while, so when you retire, it may be that I will also retire, and Ms. Indingaro will remain, with your permission.

THE COURT: Yes, sir. That's fine with me, if she's prepared to answer any questions. And I don't know that I would have any for you in particular. But Mr. Newsom has got your back as far as your official capacity is concerned. So all right. Thank you.

MR. MULROY: Thank you, Your Honor.

THE COURT: Mr. Newsom, any quick response to that before I step back?

MR. NEWSOM: No, Your Honor. Thank you.

THE COURT: Okay. Well, all right. Y'all give me a few minutes, and I'll come back and either say good-bye or ask some questions.

(Short break.)

THE COURT: All right.

MR. NEWSOM: Your Honor, if I may?

THE COURT: Yes, sir. You've got second thoughts?

MR. NEWSOM: Well, I do. With the benefit of younger minds, I would like to revise and extend my remarks just a bit.

THE COURT: Sure. If you don't mind using the microphone.

MR. NEWSOM: Your Honor, your question to me during my presentation was what does this statute add that is not in the previous acts. And I would point out to the Court

that it does add a time, place and manner aspect to the statute that is not contained in the previous statutory scheme.

THE COURT: Is that in a location where an adult could be -- adult cabaret entertainment could be viewed by a person who's not an adult?

MR. NEWSOM: Yes, Your Honor. Together with public places as well. So I know that's belaboring the obvious, but I didn't want to leave my poorly articulated point standing --

THE COURT: Okay.

MR. NEWSOM: -- before the Court had the opportunity to explore this further. Thank you, Your Honor.

THE COURT: Yes, sir.

So Mr. Timmons, I want to start with you, and you've said this is -- strict scrutiny applies. It's a content-based restriction. And it may be obvious to you, but I just want you to tell me, you know, how does this regulate content? What is it about the statute?

MR. TIMMONS: Do you want me to answer it from here or are you going to?

THE COURT: It's completely up to you. There's a microphone right in front of you. No, no, no. I mean that gray bar right there is a microphone.

MR. TIMMONS: I guess I knew that. So there are

a couple of different ways. First of all -- so part of viewpoint discrimination relates directly to the identity of the performer. Ms. Stewart is going to find me the quote here. Yeah. So this is Reed versus Town of Gilbert. "Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, the Supreme Court has insisted that laws favoring some speakers over others demands strict scrutiny when the legislature's speaker preference reflects their content preference."

"Thus a law limiting the content of newspapers but only newspapers could not evade strict scrutiny because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral because it singled out corporations as a class of speakers. Characterizing a distinction as a speaker -- as speaker based is only the beginning, not the end of the inquiry."

So here, we know, we know who the legislature was targeting. They were very clear about it. And here, we've got a category of speakers, male and female impersonators, that for obvious reason -- I mean, reasons that I hope we don't have to put on a lot of proof about to persuade everybody of.

THE COURT: Well, but male and female

impersonators, that's already part of the Tennessee law under these definitions, isn't it?

MR. TIMMONS: I mean, it wasn't -- this statute, first of all, changes and broadens the regulation of that statute. I did mention earlier, Your Honor, that we do take issue with the constitutionality of that underlying definition of harmful to minors. I just don't think it's really pertinent to --

THE COURT: Well, so I'm looking at 7-51-1401, and it references adult cabaret under the definition. And within adult cabaret includes many of the same labels that are in the statute that has recently been passed. So I guess I'm just -- I'm asking you what about the statute that was passed is aimed at a specific -- either specific content or a specific speaker?

MR. TIMMONS: The existing definition of adult cabaret, that regulates what businesses host. What materials businesses put on the shelves. That regulates where businesses can display lewd magazines or videos. Or businesses can have performers. It doesn't regulate performers. This takes those categories of performers that are the subject matter of a regulation on businesses, and it makes them the criminals.

THE COURT: Okay.

MR. TIMMONS: This eradicates the requirement

that the performance be compensated that exists in the previous adult-oriented business statutes, and it says that an individual person who does this -- who performs at all, even just one time for no money, they're now the regulated party, and they're now the criminal.

And they have been also deprived, I would -- and this is crucial of the affirmative defense that exists in the adult-oriented business and obscenity statutes of parental consent. Remember Miller -- I'm sorry. Not Miller. Reno doesn't create a sliding scale. Neither does Ginsberg actually, predating Miller. There wasn't a sliding scale of, say, content that's appropriate for minors who are three versus content for minors that are 17 years and 364 days. You're either a minor or you're not.

And so when we think about the appropriate minor, we've got to talk about who we're excluding from any kind of content that would run afoul of the statute. And that's where parental consent becomes really important. And we think about these sort of age-restrictive schemes in a kind of, I think, common sense way because we're all used to seeing it at the movie theater, right?

But movies, that's self-regulated. And if you've got a parent with you and you're 17, you can go to that R-rated movie. If you've got a parent with you and you're 13, you can go to that R-rated movie. And it's, again,

that's a self-imposed regulatory scheme by the industry.

The Communications Decency Act, this is out of Reno. The Communications Decency Act differs from the various laws and orders upheld in those cases in many ways including that it does not allow parents to consent to their children's use of restricted materials; it is not limited to commercial transactions; fails to provide any definition of indecent and omits any requirement that patently offensive material lacks socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the unique characteristics of the regulated material.

So have I answered Your Honor's question?

THE COURT: Yeah.

MR. TIMMONS: Okay.

THE COURT: I believe you have. Unless there are other reasons why you think it's content based, that it's a content-based restriction. The point I was getting at is you're saying strict scrutiny applies, presumptively unconstitutional. And I'm about to hear from Mr. Newsom about what he thinks about that. So I just wanted to understand why you think this statute applies to categories of content.

MR. TIMMONS: So two other points, and I think I can make them briefly. The first is that by taking the

definitions that were already extent in Tennessee law and removing them from their context -- and, I mean, obviously I've already talked about how it applies in different people. It strips them out of their narrow tailoring.

So that by itself means this whole scheme has to be subjected to strict scrutiny again. That statute might be constitutional. I don't believe that that regulatory scheme has ever been challenged in federal court. I think there is a pre- --

THE COURT: When you say that statute, you're talking about the adult-oriented establishments statutes.

MR. TIMMONS: Yeah. The section of the obscenity Statute 39- -- the part in Title 39 that is cross-referenced in 1407 is -- that statute has been tested only once to my knowledge. It was pre Reno. And it was a state court case, Tennessee Supreme Court case. Davis-Kidd Booksellers versus McWherter. It's largely a case about the Tennessee constitution. There is a sort of cursory First Amendment analysis.

But it is completely -- it is in complete conflict with the subsequent Reno analysis. And Ms. Stewart has just pointed out some of this context that we're talking about here. Gosh, I didn't even realize how -- this is the State's burden under Title 39 Section 17-914.

"The state has the burden of proving that the

material" -- this is material that's harmful to minors -- "is displayed. Material is not considered displayed under this section if: (1) The material is placed in binder racks that cover the lower two thirds of the material and the viewable one third is not harmful to minors. Located at a height of not less than five and one half feet from the floor." I think we see who they're trying to protect there. "Reasonable steps are taken to prevent minors from perusing the material. The material is sealed, and it if contains material on its cover that is harmful to minors, it must also be opaquely wrapped. The material is placed out of sight underneath the counter, or the material is located so that the material is not open to view by minors and is located in an area restricted to adults."

This list goes on and on for a couple of pages. And that is the type of narrow tailoring that I am talking about being stripped away from this and replaced with an area where it can't be viewed by minors. And the State has to prove all that. Now we have a -- the State says well, this was in a place that was potentially viewed by minors. And now the defendant is going to have to come forward and prove that they had taken sufficient steps to prevent minors from seeing it, I suppose. The statute isn't clear. It's vague.

THE COURT: Okay. Real quick. In Reed versus Town of Gilbert, you gave an example of there's two ways we

get to strict scrutiny. One is if it's content-based restriction. The other is if it seems to be content neutral on its face, you can look to the legislative history and see if they're trying to address content.

And my question to you is, is that part of the opinion, or is that dicta from Reed versus Town of Gilbert?

MR. TIMMONS: So it's actually the Supreme Court rejecting the appellate court's reasoning. So the section of the statute says "The Court of Appeals and the United States misunderstand our decision in Ward as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. Ward had nothing to say about facially content-based restrictions, because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city."

"In that context we looked to governmental motive, including whether the government had regulated speech because of disagreement with its message, and whether the regulation was justified without reference to the content of the speech." So the case whose holding that was is --

THE COURT: Ward.

MR. TIMMONS: Ward versus Rock Against Racism, 491 U.S. 781. And it forms a part of a basis for Reed's much more recent reasoning.

THE COURT: I see. Okay. All right.

Mr. Newsom?

MR. NEWSOM: Yes, Your Honor.

THE COURT: You agree it's strict scrutiny?

MR. NEWSOM: No, Your Honor. We do not. In the first instance the state's position, as I've articulated it, is that what we're dealing with is obscene conduct. And as much as my friend Mr. Timmons wants to generalize the conduct at issue here, if we dig into the statute, the conduct that is being regulated is indeed obscene. And I don't know if I should hesitate to read that conduct before the Court.

THE COURT: Well, if you --

MR. NEWSOM: But I think the Court has got it, certainly understands that when we dig into the statutory language that the underlying conduct that is at issue is certainly obscene. And just to pick out an example that is not so lurid perhaps. Excessive violence under TCA 39-17-901 4, "through the depiction of acts of violence in such a graphic or bloody manner as to exceed common limits of custom and candor or in such a manner that is apparent that the predominant appeal of the portrayal is portrayal of violence for violence's sake." Now, is that something, of course, that is something that should be viewed by minors? We suggest not. Certainly not by entertainers in a live performance, Your Honor.

But to get to the question of if this conduct is protected by the First Amendment, we would submit that the Court should review the case of Entertainment Productions, Incorporated versus Shelby County, 721 F.3d 729. It's a 2013 Sixth Circuit opinion in which the Court said, "We assess the constitutionality of regulations that purport to ameliorate the deleterious secondary effects of sexually oriented establishments under the intermediate scrutiny standard announced in City of Renton versus Playtime Theaters, 475 U.S. 41. According to Renton, content-neutral regulations of the place -- time, place or manner of protected expression are valid so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."

So Your Honor, we reject the argument that a strict scrutiny standard would apply and would insist that if this is not obscene conduct that's being regulated, that the intermediate scrutiny standard articulated there would be the applicable standard for the Court to utilize.

THE COURT: So is it your position then that it is content neutral?

MR. NEWSOM: It is. It is.

THE COURT: What about Mr. Timmons' point that, you know, you pull the -- you pull these definitions kind of out from the regulatory framework that's already in place

that is, in his words, narrowly tailored to address the concerns that you're articulating, and now we've just sort of cobbled together this new statute, and we throw in anywhere a minor might be -- well, in a location where the adult cabaret entertainment could be viewed by a person who's not an adult. I mean, that's anyplace, Mr. Newsom. I mean...

MR. NEWSOM: I'd like to take that on, as well as one of the arguments that Mr. Timmons made earlier. And that is that the legislature has an interest in regulating conduct such as this. And, of course, we do insist that it's obscene conduct that is performed in the presence of minors, either recklessly or with intent, which is the language of the statute.

And so it strikes us as not at all inappropriate that the legislature would determine that that conduct as regards to conduct that is done in the presence of minors is conduct that is deserving of criminal sanction, including misdemeanor and felony consequences, Your Honor. That that is within the discretion of the legislature of the State of Tennessee to regulate conduct that is obscene in nature.

THE COURT: Well, I still go back to my question. If obscenity is sort of this umbrella category that's already regulated, this statute, I don't know, I'm just trying to understand what it would apply to, if not to the Miss Piggy context or something along those lines. I mean, there are

kids running around the barbecue fest, right?

MR. NEWSOM: Well, of course there are, Your Honor. But when you look at what the Miss -- of course the Miss -- I think that what -- the State thinks that what Mr. Timmons is arguing with regard to Miss Piggy is that this is perhaps a cross-dresser. That is not conduct that is made illegal under this statute.

This statute is much more pointed. And for instance --

THE COURT: Well, I mean, it does include male or female impersonators, doesn't it?

MR. NEWSOM: Oh, it does. But it includes male or female impersonators who, for instance, are depicting acts that are intended to result in sexual excitement, meaning the condition of human male or female genitals when in a state of sexual stimulation or arousal. Now, I haven't seen that at the barbecue contest.

THE COURT: Well -- okay.

MR. NEWSOM: You can go down the line, and I don't want to belabor the point with the Court, but these are things that are not just a --

THE COURT: Well, my question -- I mean, you know, the sponsor of this bill was concerned about what was coming to Jackson, right? At least according to some of the material we've received, there was concern about what amounts

to a drag show coming to Jackson. Well, those depictions, although they were, you know, clearly comical from Mr. Timmons, I mean, couldn't that be construed as a drag show?

MR. NEWSOM: Your Honor, if the Court determines that the legislative history is important to the Court's decision, when going back and looking at the legislative history, we'll see that the original sponsor of the bill was informed by other legislators that his initial intent was not something, of course, that the courts would accept. And steered the sponsor back to look at the authorities that provide guidance to the legislature in attempting to regulate conduct. So the sponsor's original concept as perhaps reflected by a lawsuit --

THE COURT: He should have kept his powder dry, is that?

MR. NEWSOM: Well, you know, I'm sure I've said things that I've lived to regret, Your Honor. But I think --

THE COURT: Not you.

MR. NEWSOM: -- when you look -- if you think it's important to look at the legislative history in context, I think what the Court is going to find is that the sponsor's original idea was refined greatly before the statute was enacted in the legislature.

THE COURT: Okay. All right.

Mr. Timmons, you've included the governor in your lawsuit. As I understood Universal Life and I haven't memorized it, but I think one of the things it said was that the take care clause was not enough for federal jurisdiction over the governor. So what basis is there for us to have the governor in this case?

MR. TIMMONS: Your Honor, this is where I say that those prudential concerns that apply only to free speech cases that relate to overbreadth come into play. I think that under that -- in any other First Amendment case, no doubt, the governor's take care power is not sufficient. However here, he's made statements that indicate a credible threat of enforcement. And that he does have the power to do it. And here we have those other prudential concerns.

Can I address two points Mr. Newsom made real quick?

THE COURT: Sure.

MR. TIMMONS: I'm just going to go to cases that he cited because there are some problems with those citations. First, he quoted you the definition of excess violence. That Davis-Kidd case that I mentioned earlier, one of the very few things that the Court actually managed to do in the Davis-Kidd case was hold that definition of excess violence exceeded the scope of what was permissible to regulate under the Miller test and was unconstitutional. So

just to be clear, that case, that part of the statute, that's not what we're talking about here.

The second thing that Mr. Newsom relied on is the case Entertainment Productions versus Shelby County, which was about Shelby County's strip club regulations or rather, the Tennessee statutory scheme on which Shelby County predicated those. The problem with that is that the whole case was about that context that I was talking about. It goes to intermediate scrutiny because they're regulating the ancillary effects of strip clubs.

When Mr. Newsom talked about ancillary effects, that's not the direct effects of speech. That's the other stuff that happens around strip clubs. Prostitution, drug use, drug sales, violent crime, car break-ins. That's the ancillary effects that cities and states have the power to regulate when they talk about the location of strip clubs. That's what lowers the scrutiny from strict to heightened, and the context and the nature of the tailoring is what that whole case was about. So you can't just say, well, once upon a time, the Sixth Circuit looked at these definitions in a totally different context and applied a different standard to them.

And here's the language. This is some great language from Entertainment Productions. It was made clear that if an "adult entertainment sweeps in mainstream artistic

performances and if the presentation of a single performance suffices to subject an establishment to the Tennessee act, then the act applies to precisely the set of establishment that doomed the statutes noted earlier." Doomed. That's the Sixth Circuit, which were invalidated by this and other circuit courts.

The statute at issue explicitly takes it from an establishment that is an adult cabaret and says that an adult cabaret performance is anything that anybody does that meets these definitions in any place that could be viewed by a minor one time. Even without compensation. I also do not -- Mr. Newsom said that there's a mens rea requirement of recklessly here.

I don't have that section of the statute in front of me, and I have to confess there have been so many versions of this law that I get them confused sometimes. But I don't recall there being a written intent or recklessness requirement in the statute. And if the state's asking you to imply one, then we're already out of the bounds of void for vagueness.

THE COURT: Well, that raises a good point. I want to make sure that I'm looking at the right version of this law. I was looking at document -- it's -- in our docket system it's Document 19-1. It's Exhibit A. Public chapter Number 2. Senate bill Number 3.

MR. NEWSOM: That's it, Your Honor.

THE COURT: Okay. All right. So everybody agrees that that's what I should be looking at. I didn't see a mens rea in there either. What did I miss?

MR. NEWSOM: Excuse me just a second, Your Honor --

THE COURT: Sure.

MR. NEWSOM: -- if I may.

Your Honor?

THE COURT: Here we go.

MR. NEWSOM: Sorry. The mens rea requirement is contained in a more general statute, which is at TCA 39-11-301(c). Where there's the requirement that an act be performed intentionally, knowingly or recklessly. That's the citation, Your Honor.

THE COURT: All right. And that's somehow tied in with this statute?

MR. NEWSOM: Yes, Your Honor.

THE COURT: Okay. All right. All right.

Did you want to respond?

MR. NEWSOM: Just real briefly, Your Honor. Your Honor asked the question about the governor. And I think that this would apply to General Skrmetti as well. And the law is that to establish redressability, a plaintiff must plead facts sufficient to establish that the Court is capable

of providing relief that would redress the alleged injury.

And since plaintiff has not shown that it has an injury fairly traceable to the governor or to the attorney general, no remedy applicable to those defendants, be it an injunction or a declaration, would redress plaintiff's alleged injuries. And there I refer to the more recent case of R.K. ex rel. J.K. versus Lee, which is 53 F.4th 995 at 1001.

THE COURT: While I've got you, you mentioned the Entertainment Productions versus Shelby County.

MR. NEWSOM: Yes, Your Honor.

THE COURT: 721 F.3d and then I didn't get the page number.

MR. NEWSOM: I apologize.

THE COURT: No, I just didn't write fast enough. Go ahead.

MR. NEWSOM: It's 729, Your Honor.

THE COURT: Okay.

MR. NEWSOM: It's a 2013 case.

THE COURT: All right. Well, so I've got a lot to think about. And I appreciate y'all's hard work and quick response. And so you've given us a lot to chew on. I will try to get an order out just as soon as humanly possible, and then we'll take it from there. Okay?

MR. NEWSOM: Thank you, Your Honor.

THE COURT: Thanks everybody. Y'all have a good rest of your evening.

(Adjournment.)

C E R T I F I C A T E

I, CANDACE S. COVEY, do hereby certify that the foregoing 67 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the Oral Arguments hearing on the 30th day of March, 2023, in the matter of:

Friends of George's, Inc.
vs.
The State of Tennessee, et al.

Dated this 3rd day of April, 2023.

S/Candace S. Covey

CANDACE S. COVEY, LCR, RDR, CRR
Official court reporter
United States District Court
Western District of Tennessee